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Supreme Court, U.S.
FILED
AUG - 1 1994
OFFICE OF THE CLERK

No. 93-2015

In The

Supreme Court of the United States

October Term, 1994

DENNIS T. DEMPSEY, RONALD E. SHAVER, RAYMOND E. YOUNG, A. W. FISH, G. W. GATTEN, RUSSELL N. ROGERS, R. J. WEBER, J. P. VALDEZ and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioners,

v.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, UNITED TRANSPORTATION UNION and J. G. BAILEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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A. The opinion of this Court on June 20, 1994, in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. ___, 62 U.S.L.W. 4537 (U.S. June 20, 1994), ("Norris"), reinforces our submission that the decision below, which rests on an expansive application of *Trans World Airlines v. Flight Attendants*, 489 U.S. 426 (1989), and a refusal to follow the well-established contrary precedent under the National

Labor Relations Act ("NLRA"), 29 U.S.C. §§151 *et seq.*, merits plenary review by this Court.

In *Norris*, the Supreme Court of Hawaii found that the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, did not pre-empt an airline employee's state tort claims of retaliatory discharge. In reaching that conclusion, the court relied upon this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), which involved Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and held that a claim of wrongful termination arising from the employee's filing of a state worker's compensation claim did not require an interpretation of the collective bargaining agreement and, being independent of the labor contract, was not pre-empted by Section 301. Notwithstanding the distinct differences between the two statutes and the mandatory arbitration mechanisms provided in the RLA, the Court "adopt[ed] the *Lingle* standard to resolve claims of RLA pre-emption." *Norris*, 62 U.S.L.W. at 4542. In so doing, the Court provided the following authoritative test for determining whether determinations under the NLRA set the standard in RLA cases:

> It is true, as petitioners observe, that the RLA and the LMRA are not identical in language, history, and purpose. The LMRA, unlike the RLA, does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements. Nonetheless, the common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law, see, *e.g.*, *International Assn. of Machinists v. Central Airlines*, 372 U.S. 682, 691-692 (1963); *Allis Chalmers v. Lueck*, 471

> U.S. 202, 210 (1985), and the desirability of having a uniform common law of labor law preemption, *cf. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-384 (1969), support the application of the *Lingle* standard in RLA cases as well. (*Id.* at n.9).

The Court of Appeals' decision is incompatible with each of these three test points. First, both Section 1a of the RLA, 45 U.S.C. §151a, and Section 7 of the NLRA, 29 U.S.C. §157, contain common purposes with respect to the factual situation herein: freedom of association and stability of collective bargaining relationships. *See, e.g., DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983), quoting from *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981). Second, the decision below failed to acknowledge the parallel and identical development of RLA and NLRA law upon the nondiscriminatory assessment of monies from employees for the collective bargaining purposes of the bargaining agent. In *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Court implied the duty of fair representation upon unions from a reading of Section 2 Fourth of the RLA, 45 U.S.C. §152 Fourth. This duty of fair representation of all members of the craft was extended to employers and employees covered by the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). In *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435 (1984), the Court held that a railroad employee could not be required by an agreement made pursuant to Section 2 Eleventh of the RLA to pay fees and assessments to the bargaining agent that were not related to its collective bargaining activities. Subsequently, in *Communications Workers v. Beck*, 487 U.S. 735 (1988), the

Court concluded Section 2 Eleventh of the RLA and Section 8(a)(3) of the NLRA are statutory equivalents and held that employees under the NLRA may be required to pay only those fees and dues necessary for the representative of the employees to deal with the employer on labor-management issues. *Id.*, 762. The contractual language in this case implicates the fundamental statutory rights owed employees pursuant to the UTU's fiduciary duty of fair dealing to the members of the train service crafts, as set forth in Sections 2 Third and Fourth of the RLA, as well as the carrier's obligation under Section 2 Fourth to take no action "to assist in the collection" of fees and assessments of the nature herein to UTU, unless pursuant to lawful union security agreements as provided in Section 2 Eleventh, which would include the statutory prohibition upon compulsory dual unionism set forth in subparagraph (c) of Section 2 Eleventh. This dual rationale or incorporation of the duty of fair dealing into the proper assessment and collection of union fees has underlined the application by the National Labor Relations Board of Section 8(a)(3) of the NLRA in situations, like that before the Court, which are governed by the Court's decision in *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). *See, e.g., International Union of Electronic Workers, Local 444 (Paramax Systems Corp.)*, 311 N.L.R.B. No. 105 (1993). *See also Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2nd Cir. 1974), a RLA case holding "union membership [is] not a proper ground for determining seniority." Third, uniform common law on seniority protection fees has the same desirable effects under both statutes: protection of the involved bargaining representative against free riders, protection of the

individual employee's freedom of association and freedom from compulsory dual unionism, increased potential for negotiated agreements, and reduction in possible disruptions to rail service arising from increased tensions between employees ebbing-and-flowing between the engine and train service crafts.

In meeting these requirements, it appears that the Court of Appeals should have, but did not, look to the decisions of this Court and the various Courts of Appeals that have ruled upon the payment of fees and other devices for seniority maintenance and accumulation as prohibited activities that encourage union adherence or membership. From that standpoint, as well as defining the proper standard to be used in determining whether NLRA decisional precedent should be applied in a similar situation arising under the RLA, this case raises a question of recurring importance to the parties, to other railroads, to the various railway unions, and to federal agencies applying the RLA, which requires the guidance that only this Court can authoritatively give.

B. Respondents make no effort to distinguish this case from *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), and the NLRA cases following it. Rather, they continue to rely upon a reading of *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), as always requiring a showing of anti-union animus or employer interference with the intentional or avowed purpose of interfering with the union's bargaining agency in any post-certification conduct. *Trans World Airlines*, however, was a strike crossover case. It did not deal with the conduct of a carrier with one bargaining representative which "inherently encourages or discourages union membership" in a

second bargaining representative that the employer is obligated to meet and treat with under the RLA. *Radio Officers Union v. NLRB*, 347 U.S. *supra*, at 45. Moreover, respondents fail to acknowledge that *Trans World Airlines* dealt with Section 2 Fourth in the context of the exercise of an employer's economic self-help powers after exhaustion of the RLA dispute resolution procedures and then only in regard to the proposition that "[n]either the RLA itself nor any analogies to the NLRA indicate that the crossover policy adopted by TWA during the period of self-help was unlawful." *Id.*, 443. In addition, two factors arise here that were not present in that case. By reason of the fact that payment of the "full monthly dues" will satisfy both UTU's seniority protection scheme and the union shop provisions in effect, the transferred train service employees will no longer "continue to bear the burden of paying" union dues to BLE, as bargaining representative for the craft of locomotive engineers. Unlike the situation in *Trans World Airlines*, the transferees are not foreclosed from "[f]ree riding on the benefits that may come to these employees as a result of [BLE's] status" as the engineers' bargaining representative. *Id.* at 436 n.2. Likewise, there is a clear "prospect of a continuing diminution of seniority" after transfer, unless "full monthly dues" are paid UTU. *Id.*, 437. These references in *Trans World Airlines, Inc.*, establish that the specific showing of anti-union animus against the second union in this scenario is not a prerequisite to determining the validity of the labor contract under Sections 2 Fourth and Eleventh of the RLA. In fact, this Court has decided on a number of previous occasions that RLA contract validity questions are for the courts, that the courts could

determine validity through declaratory relief without a prior showing of anti-union animus and, if invalid under the RLA, can exercise their injunctive powers to enforce the commands of the RLA. *See Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3 (1959). *Also see, McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969); *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (1986), *cert. denied*, 479 U.S. 1018 (1986).

In sum, respondents have offered no justification whatsoever for defining "condition of employment" as used in the two statutes differently or for denying these employees covered by the RLA the treatment according employees under the NLRA relative to the payment of fees to the union while forced to transfer out of one craft to work in another. A carrier and one union should not be entitled by agreement to deprive a railroad employee of his association choice and his employment rights in violation of the commands of the RLA, and it is not the function of a court of appeals to limit this Court's precedents by expanding a decision (*Trans World Airlines, Inc.*), when that decision itself expressly looked to NLRA precedents.

CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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